IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1662

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff-Appellant,

v.

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants-Appellees

JURISDICTIONAL STATEMENT

JOHN G. NICHOLAS
Attorney for Appellant
37-11 Union Street
Flushing, New York 11354

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Mayflower Farms v. Ten Eyck, 297, U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1935);

Smith v. Cahoon, 283 U. S. 553, 51 S.Ct. 582, 75 L.Ed.1264 (1937).

Statutes:

Sections 205(a), 3012(b) and 3216(b) Civil Practice Law and Rules of the State of New York

Constitutional Provisions:

United States Constitution Amendment XIV

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976
No.

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff-Appellant

v.

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.

Defendants-Appellees

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, LUCILLE WITZ, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Court of Appeals of the State

of New York in this case and should exercise such jurisdiction herein.

OPINION BELOW

The judgment of the Court of Appeals of the State of New York is included herein as Appendix A.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action for wrongful death. The judgment of the Court of Appeals of the State of New York was entered on February 17, 1976. A timely notice of appeal was filed on May 6, 1976 in the Supreme Court of the State of New York. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, subparagraph (2).

Cases that sustain the jurisdiction of this Court include:

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d. 36 (1972);

Smith v. Cahoon, 283 U.S.553, 51 S.Ct. 582, 75 L.Ed. 1264 (1931);

Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1935).

The validity of Sections 3012(b) and 3216(b) of the Civil Practice Law and Rules of the State of New York are submitted for the consideration of this Court and the text thereof is included herein as Appendix B.

QUESTIONS PRESENTED

Whether the Court below properly affirmed the decision of the Appellate Division of the Supreme Court of the State of New York which reversed the

lower Court's decision and granted Defendants' motion to dismiss for failure to timely serve the complaint in this action.

Whether Sections 3012(b) and 3216(b) of the Civil Practice Law and Rules of the State of New York are so inconsistent and inherently unfair as to deny plaintiffs, similarly constituted, the equal protection of the law and the right of due process, so as to be repugnant to the 14th amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

On February 17, 1962, Guy X. Witz died, trapped in a stalled elevator during a fire in a commercial building located in the City of New York.

This action to recover damages for his wrongful death was commenced by service of the summons on February 14, 1964. Defendants appeared by various attorneys and demands for copies of the complaint were made on March 12, 1964, April 10, 1964 and April 29, 1964.

Concededly, no complaint was served within the twenty day period following service of these demands. However, no motion was thereafter made on behalf of any of the Defendants to dismiss the action on this basis and, so far as the Record reveals, there was no further activity until February 14, 1974, when Plaintiff's attorney served a verified complaint, together with photocopies of the summonses and notices of appearance previously served.

Copies of the verified complaint were

retained by the attorneys for the various Defendants for periods of from almost three weeks to almost two and one-half months before they were returned with notices or letters rejecting the service as untimely.

Thereafter, by notice of motion dated April 6, 1974, Plaintiff moved to compel Defendants to accept service of the complaint. Plaintiff's affidavit set forth that at the time of her husband's sudden death he was thirty-five years of age and, in addition to her, he left surviving two infant children, a daughter who was then seven years of age and a son then four years of age. The decedent was self-employed with an office in the building wbere he met his death. After working until approximately 2:00 a.m. on February 17, 1962, the

decedent had entered an elevator on the fourth floor. Between the third and fourth floors, the elevator stalled because of power failure caused by a fire in the building. Trapped in the elevator, the decedent suffocated and burned to death.

On May 23, 1974, Defendants moved to dismiss the action for failure to serve a complaint.

The Supreme Court of the State of New York granted Plaintiff's motion and denied Defendants' motion requiring, however, that Plaintiff's attorney of record personally pay $100.00 costs to the attorneys for Defendants.

The Court predicated its determination at least in part, upon the failure of the Defendants to serve a forty-five day notice which, under CPLR 3216, is

a condition precedent to a motion to dismiss for neglect to prosecute.

Defendants appealed to the Appellate Division, First Department which reversed the said order on February 25, 1975 and granted Defendants motion to dismiss for failure to serve a complaint. Plaintiff appealed to the Court of Appeals of the State of New York which entered judgment on February 17, 1976 affirming the decision of the Appellate Division.

The brief of the Plaintiff submitted to the Court of Appeals conceded that CPLR 3012(b) does not carry the protection afforded by the forty-five day notice requirement of CPLR 3216. It also respectfully suggested that the omission of such protection is an undeserved and unwarranted burden to

place upon the innocent Plaintiff. The Court's attention was also directed to CPLR 205(a) which contained another defense mechanism to insure the Plaintiff his day in Court. This section provides that if an action is timely commenced and is terminated in a manner other than on the merits or under specified exceptions, the Plaintiff may commence a new action upon the same cause of action within six months after its termination even though the period of limitations would otherwise have run. This six month grace period does not apply, however, where the dismissal is for failure to prosecute. The brief further suggested to the Court that there was no inequity in this provision when the

motion to dismiss is governed by CPLR 3216 for the negligent or forgetful attorney and his client are covered by the protective umbrella of the forty-five day requirement but that the plaintiff in a matter governed by CPLR 3012(b) is afforded no such protection but is, in effect, helpless in a situation which he has not created and from which he is unable to escape.

The Court was respectfully urged not to wait for the Legislature to remedy the wrong caused by the inequities inherent in the statute, but, in the sound exercise of its discretion and the interest of justice, to compel acceptance of the complaint herein, thereby allowing the Plaintiff to litigate her cause on the merits and rescue

her from a morass of technicality corrected statutorily under CPLR 3216 but left for the Court to correct under CPLR 3012(b).

The Court was, therefore, apprised of the inequities inherent in the statute and the denial of due process to the Plaintiff herein and of the equal protection of the law to plaintiffs similarly affected by the neglect of counsel.

By its dismissal of the appeal, the Court has affirmed the constitutionnality of the applicable statutes and the jurisdiction of this Court is respectfully invoked on the grounds that a constitutional question was submitted to the Court below and it sustained the validity of the statutes.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that Section 3216(b) (3) provides that dismissal of an action for failure to prosecute cannot be granted after issue has been joined unless a demand is served requiring the plaintiff to resume prosecution and serve and file a note of issue within forty-five days after receipt of such demand while CPLR 3012(b) provides that if a complaint is not served within twenty days after service of the demand, the Court upon motion may dismiss the action. There is, therefore, a condition precedent to the granting of a motion to dismiss

when a complaint has been served which does not exist where no complaint has been served. Both situations are, admittedly, the result of neglect of counsel, often inadvertent and unintentional.

It is submitted that the Legislature in enacting CPLR 3216 was attempting to protect the innocent plaintiff from such neglect, thereby affording him an umbrella of protection in order to preserve his right of action. It is respectfully submitted that this protection extended to plaintiffs subject to the neglect or inadvertence of counsel cannot be extended to one class of such plaintiffs and denied to others similarly constituted. The plaintiff

whose attorney fails to file a note of issue receives a warning that unless he does so within forty-five days his client's cause will be lost while the attorney who fails to file and serve a complaint receives instead a notice of motion to dismiss which motion is invariably granted.

The consequences of neglect of counsel should not be suffered by those plaintiffs whose attorneys fail to file and serve one document while such consequences are avoided by plaintiffs whose attorneys fail to file and serve a different document.

The protection provided all citizens of the United States by the Federal Constitution cannot be based on the

nature of the document at issue.

This Court is respectfully urged to consider that the inequities inherent in the applicable sections of the Civil Practice Law and Rules of the State of New York deny equal protection to all plaintiffs who are victimized by the failure of counsel to file documents necessary to prosecute an action. By allowing these sections to remain unchallenged the Court will allow those rights guaranteed to all citizens of the United States to be denied to certain plaintiffs because of the content and nature of a document of practice.

A substantial constitutional question has been submitted to the Court below and is submitted to the Court

herein. Equal protection and the right of due process must be based on the nature and rights of citizenship. It cannot be denied on the basis of the text and wording of a paper. It is inconceivable that failure to file and serve one document in an action can be cause for a warning of dire consequences while failure to file and serve another document can bring those consequences without the benefit of such a warning.

The attorney alone does not suffer in such a situation, but it is rather the innocent plaintiff who has placed his trust in counsel and must bear the consequences of the actions of such counsel. The Legislature, in its

wisdom, has granted a reprieve to a plaintiff whose attorney's actions are within the purview of CPLR 3216 but has granted no such reprieve to a plaintiff whose attorney's actions are within the purview of CPLR 3012(b).

Such an inconsistency denies the right of due process to the plaintiff governed by 3012(b) and denies him the equal protection of the law which is granted all citizens of the United States by the 14th amendment of the Federal Constitution.

It is, therefore, submitted that Section 3012(b) of the Civil Practice Law and Rules of the State of New York is unconstitutional and that such allegation presents a substantial federal question for the resolution of

which the jurisdiction of this Court is respectfully invoked.

This Court in Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972) determined that certain inequities would be countenanced only when they resulted in the accomplishment of a valid State objective. Here, as in Lindsey failure to challenge those statutory provisions resulting in such inequities cannot result in the accomplishment of a valid State objective. The granting of the right of action to certain civil litigants and the denial of such right to other civil litigants similarly constituted is, it is submitted, a perversion of due process and must not be countenanced.

CONCLUSION

For the reasons stated above, Appellant submits that this appeal brings before the Court substantial and important constitutional questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Dated: May 12, 1976

Respectfully submitted,

JOHN G. NICHOLAS
Attorney for Appellant

APPENDIX A

1 Mo. No. 145 SSD 3

----------x

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Appellant,

vs.

RENNER REALTY CORP., et al.

Respondents,

and ELIZABETH S. CALLARGY, et al,

Defendants.

----------x

Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from involves a question of pure discretion of the type not reviewable by the Court of Appeals.

DECISION COURT OF APPEALS February 17, 1976

APPENDIX B

Section 3012(b) Demand for complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. A demand or motion under this section does not of itself constitute an appearance in the action.

Section 3216(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said forty-five day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

APPENDIX C

COURT OF APPEALS
STATE OF NEW YORK
- x

LUCILLE WITZ, Administratrix of the Estate of GUY X. WITZ, deceased,

Plaintiff,

-against-

RENNER REALTY CORP., ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD, as Executors of the Estate of GERTRUDE C. SHERWOOD, deceased, SARAH E. MORGAN, R. M. OLLINGER, INC., HELMSLEY-SPEAR, INC. and WATSON ELEVATOR COMPANY, a corporation, TURNBULL ELEVATOR, INC.,

Defendants,
- x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that LUCILLE WITZ, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dismissing entered in this action on February 17, 1976.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated: May 6, 1976

JOHN G. NICHOLAS
Attorney for Appellant
37-11 Union Street
Flushing, New York 11354

TO: SATTERLEE & STEPHENS, ESQS.
Attorneys for Defendants
ELIZABETH S. CALLARGY, REGINA S. KEARNS, JAMES K. O. SHERWOOD and ESTATE OF GERTRUDE C. SHERWOOD and SARAH E. MORGAN
277 Park Avenue
New York, New York 10017

TO: BENJAMIN E. GELERMAN, ESQ.
Attorney for Defendants
RENNER REALTY CORP.,
R. M. OLLINGER, INC.
WATSON ELEVATOR COMPANY, a corporation and
TURNBULL ELEVATOR, INC.
345 Adams Street
Brooklyn, New York 11201

TO: MELE & CULLEN, ESQS.
Attorneys for Defendant
HELMSLEY-SPEAR, INC.
150 William Street
New York, New York 10038

PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Roy H. Rudd, Jr., an attorney in the office of John G. Nicholas, Esq., attorney of record for Lucile Witz, appellant herein, depose and say that on the 6th day of May, 1976, I served a copy of the foregoing Notice of Appeal on the several parties thereto as follows:

1. Upon Elizabeth S. Callargy, Regina S. Kearns, James K. O. Sherwood and Estate of Gertrude C. Sherwood and Sarah E. Morgan, defendants by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Satterlee & Stephens, Esqs. their attorneys of record, at 277 Park Avenue, New York, New York 10017.

2. Upon Renner Realty Corp., R. M. Ollinger, Inc., Watson Elevator Company, a corporation and Turnbull Elevator, Inc. defendants, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Benjamin E. Gelerman, Esq.,their attorney of record, at 345 Adams Street, Brooklyn, New York 11201.

3. Upon Helmsley-Spear, Inc., defendant, by mailing a copy in a duly addressed envelope, with first class postage prepaid to Mele & Cullen, Esqs., its attorney of record, at 150 William Street, New York, New York 10038.

All parties required to be served have been served.

Subscribed and sworn to before me

this 6th day of May, 1976.

EDWARD J. KEENAN
Notary Public, State of New York
No. 24-4500960
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

(Filed in Supreme Court of the State of New York, New York County on May 6, 1976)